

## RESEARCH APPENDIX

Date Transfer Requested: 11/30/2018 (Per: CMH)

Part  
1 of 2

☞ Appendix R ... has been added to the 2017 LRB-6074

Appendix A ☞ LRB 17-5979

Appendix B ☞ LRB 17-5982

Appendix C ☞ LRB 17-5983

Appendix D ☞ LRB 17-5985

Appendix E ☞ LRB 17-5986

Appendix F ☞ LRB 17-5989

Appendix G ☞ LRB 17-5990

Appendix H ☞ LRB 17-5995

Appendix I ☞ LRB 17-5998

Appendix J ☞ LRB 17-6001

Appendix K ☞ LRB 17-6004

Appendix L ☞ LRB 17-6006

Appendix M ☞ LRB 17-6007

Appendix N ☞ LRB 17-6012

Appendix O ☞ LRB 17-6015

Appendix P ☞ LRB 17-6017

Appendix Q ☞ LRB 17-6019

Appendix R ☞ LRB 17-6021

Appendix S ☞ LRB 17-6023

Appendix T ☞ LRB 17-6024

Appendix U ☞ LRB 17-6025

Appendix V ☞ LRB 17-6027

Appendix W ☞ LRB 17-6028

Appendix X ☞ LRB 17-6031

Appendix Y ☞ LRB 17-6036

Appendix Z ☞ LRB 17-6037

Appendix AA ☞ LRB 17-6038

Appendix BB ☞ LRB 17-6039

Appendix CC ☞ LRB 17-6040

Appendix DD ☞ LRB 17-6041

Appendix EE ☞ LRB 17-6042

Appendix FF ☞ LRB 17-6043

Appendix GG ☞ LRB 17-6046

Appendix HH ☞ LRB 17-6047

Appendix II ☞ LRB 17-6048

Appendix JJ ☞ LRB 17-6049

Appendix KK ☞ LRB 17-6050

Appendix LL ☞ LRB 17-6051

Appendix MM ☞ LRB 17-6052

Appendix NN ☞ LRB 17-6058

Appendix OO ☞ LRB 17-6059

Appendix PP ☞ LRB 17-6065

Appendix QQ ☞ LRB 17-6067

**2017 DRAFTING REQUEST**

**Bill**

For: **Robin Vos (608) 266-9171** Drafter: **swalkenh**  
 By: Secondary Drafters: **chanaman**  
 Date: **11/15/2018** May Contact:  
 Same as LRB:

Submit via email: **YES**  
 Requester's email: **Rep.Vos@legis.wisconsin.gov**  
 Carbon copy (CC) to: **sarah.walkenhorstbarber@legis.wisconsin.gov**  
**rick.champagne@legis.wisconsin.gov**  
**steve.fawcett@legis.wisconsin.gov**  
**Alicia.Schweitzer@legis.wisconsin.gov**

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**Pre Topic:**

No specific pre topic given

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**Topic:**

Requiring notice to certain legislative leadership regarding litigation on constitutionality of statutes and allowing the assembly, the senate, and legislature an opportunity to be heard

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**Instructions:**

See attached

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**Drafting History:**

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?	rchampag 11/16/2018	kfollett 11/16/2018			
/P1	swalkenh 11/21/2018	anienaja 11/23/2018	lparisi 11/16/2018		
/P2		anienaja 11/23/2018	rchampag 11/23/2018		
/P3		csicilia	rchampag		

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
		11/26/2018	11/24/2018		
/P4	chanaman 11/26/2018	aernsttr 11/26/2018	dwalker 11/26/2018		
/P5	swalkenh 11/27/2018	eweiss 11/27/2018	dwalker 11/26/2018		
/P6	chanaman 11/28/2018	aernsttr 11/28/2018	mbarman 11/27/2018		
/P7	chanaman 11/28/2018	wjackson 11/28/2018	lparisi 11/28/2018		
/P8	swalkenh 11/30/2018	kfollett 11/30/2018	lparisi 11/28/2018		
/P9	swalkenh 11/30/2018	wjackson 11/30/2018	mbarman 11/30/2018		
/P10			dwalker 11/30/2018		

FE Sent For:

<END>



11/15/18

When the constitutionality of a statute is at issue in a case / litigated, notice to be provided to the Legislature, parallel to notice given under current law to AG

SWB - AG <sup>Service/</sup> notice under 806.04 (1) - statutory in Dec Actions case law requirement for other actions

- Extend requirements to Legislature, specifically:  
Service required to the Speaker of the Assembly,  
President of the Senate, and Senate Majority Leader

- Same opportunity to be heard as AG, on behalf of Assembly, Senate, or Legislature as a whole

- Add right of Legislature to intervene

- on behalf of Assembly, Assn of can intervene

- on behalf of Senate, Sen Org can intervene

- on behalf of entire legislature, JCLC can intervene

- do so w/in 45 days



State of Wisconsin  
2017 - 2018 LEGISLATURE

LRB-6021/?  
SWB&RAC: *Kf*

*P1*

**PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION**

- 1 AN ACT ...; relating to: notice to the legislature of claims relating to  
2 constitutionality of statutes and right of the <sup>state</sup> legislature to intervene.

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*Analysis by the Legislative Reference Bureau*

*X* This bill requires a party that alleges that a statute is unconstitutional to serve the speaker of the assembly, the president of the senate, and the senate majority leader with a copy of the proceeding. The bill also requires that, in such cases, the assembly, the senate, and the legislature are entitled to be heard.

Under current law, if a statute, ordinance, or franchise is alleged to be unconstitutional, the attorney general must be served with a copy of the proceeding and be entitled to be heard. This requirement exists in the statutes for declaratory judgment acts under section 806.04 (11). The Wisconsin Supreme Court has also extended the requirement to other types of actions involving claims that a statute is unconstitutional. See *Kurtz v. City of Waukesha*, 91 Wis. 2d 103, 280 N.W.2d 757 (1979). This bill incorporates the *Kurtz* rule into the statutes and extends both the current statutory and *Kurtz* requirements of service and an opportunity to be heard to the legislature.

The bill also provides that when the case involves the constitutionality of a statute, the assembly, the senate, and the <sup>state</sup> legislature have the right to intervene and participate in the action. Under the bill, the Committee on Assembly Organization may intervene in the action on behalf of the assembly; the Committee on Senate Organization may intervene in the action on behalf of the senate; and the Joint

both houses  
of  
the legislature

Committee on Legislative Organization may intervene in the action on behalf of the legislature.

***The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:***

1        **SECTION 1.** 13.365 of the statutes is created to read:

2        **13.365 Intervention.** Pursuant to s. 803.09 (2m), when a party to an action  
3 challenges the constitutionality of a statute:

4        (1) The committee on assembly organization may intervene in the action on  
5 behalf of the assembly.

6        (2) The committee on senate organization may intervene in the action on behalf  
7 of the senate.

8        (3) The joint committee on legislative organization may intervene in the action  
9 on behalf of the legislature.

10       **SECTION 2.** 803.09 (2m) of the statutes is created to read:

11       803.09 (2m) When a party to an action challenges the constitutionality of a  
12 statute, the assembly, the senate, and the legislature may intervene in the action as  
13 a matter of right by serving a motion upon the parties as provided in s. 801.14 within  
14 45 days

15       **SECTION 3.** 806.04 (11) of the statutes is amended to read:

16       806.04 (11) PARTIES. When declaratory relief is sought, all persons shall be  
17 made parties who have or claim any interest which would be affected by the  
18 declaration, and no declaration may prejudice the right of persons not parties to the  
19 proceeding. In any proceeding which involves the validity of a municipal ordinance  
20 or franchise, the municipality shall be made a party, and shall be entitled to be heard.

21       If a statute, ordinance, or franchise is alleged to be unconstitutional, the attorney

1 general shall also be served with a copy of the proceeding and be entitled to be heard.  
2 If a statute is alleged to be unconstitutional, the speaker of the assembly, the  
3 president of the senate, and the senate majority leader shall also be served with a  
4 copy of the proceeding and the assembly, the senate, and the <sup>state</sup> legislature shall be  
5 entitled to be heard. In any proceeding under this section in which the  
6 constitutionality, construction or application of any provision of ch. 227, or of any  
7 statute allowing a legislative committee to suspend, or to delay or prevent the  
8 adoption of, a rule as defined in s. 227.01 (13) is placed in issue by the parties, the  
9 joint committee for review of administrative rules shall be served with a copy of the  
10 petition and, with the approval of the joint committee on legislative organization,  
11 shall be made a party and be entitled to be heard. In any proceeding under this  
12 section in which the constitutionality, construction or application of any provision of  
13 ch. 13, 20, 111, 227 or 230 or subch. I, III or IV of ch. 16 or s. 753.075, or of any statute  
14 allowing a legislative committee to suspend, or to delay or prevent the adoption of,  
15 a rule as defined in s. 227.01 (13) is placed in issue by the parties, the joint committee  
16 on legislative organization shall be served with a copy of the petition and the joint  
17 committee on legislative organization, the senate committee on organization or the  
18 assembly committee on organization may intervene as a party to the proceedings and  
19 be heard.

**History:** Sup. Ct. Order, 67 Wis. 2d 585, 718 (1975); 1975 c. 218; Sup. Ct. Order, 82 Wis. 2d ix (1978); 1977 c. 449; 1979 c. 38, 89, 175; 1979 c. 330 s. 13; 1979 c. 352, 355; 1981 c. 96 s. 67; 1981 c. 187 s. 10; 1981 c. 390 s. 252; 1983 a. 255 s. 6; 1985 a. 182 s. 87; Sup. Ct. Order, 166 Wis. 2d xix (1992); 2001 a. 102, 109; 2005 a. 177, 387.

**Judicial Council Committee's Note, 1977:** Sub. (3m), as created by ch. 263, laws of 1973, is added. Sub. (3m), which was created during the time the rules of civil procedure were in the process of being adopted, was inadvertently not included in new s. 806.04 along with the other provisions of former s. 269.56. The only intent of the Judicial Council during the preparation of the Rules of Civil Procedure in regard to old s. 269.56 was to renumber it to s. 806.04. [Re Order effective July 1, 1978]

**Judicial Council Note, 1991:** Sub. (1) is amended to clarify that a declaratory judgment is not appealable as of right unless it disposes of the entire matter in litigation as to one or more of the parties. [Re Order effective July 1, 1992]

20 **SECTION 4.** Subchapter VIII (title) of chapter 893 [precedes 893.80] of the  
21 statutes is amended to read:

22 **CHAPTER 893**

SUBCHAPTER VIII

CLAIMS AGAINST GOVERNMENTAL BODIES,  
OFFICERS AND EMPLOYEES; CONSTITUTIONAL CLAIMS

**SECTION 5.** 893.825 of the statutes is created to read:

**893.825 Claim alleging a statute is unconstitutional.** If a statute is alleged to be unconstitutional, the attorney general shall be served with a copy of the proceeding and be entitled to be heard. If a statute is alleged to be unconstitutional, the speaker of the assembly, the president of the senate, and the senate majority leader shall also be served with a copy of the proceeding and the assembly, the senate, and the <sup>state</sup> legislature shall be entitled to be heard.

(END)





Rick:

17-6021

- Once notice given, wants to allow Legislature choice to intervene, and if they do, do so to the exclusion of the AG and Legislature's council will represent the State

- Assembly + Senate may vote to intervene / be heard unilaterally and with independent counsel

- If Legislature (by JCLC) requests intervention or to appear, appear by independent counsel and represent the State to the exclusion of AG / in place of AG

SWB Note - Do we need to merge or x-ref something re independent counsel?



State of Wisconsin  
2017 - 2018 LEGISLATURE

LRB-6021/P1 P2  
SWB&RAC:kjf + amn

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

- Pwf
- Reagen
- 1 AN ACT *to amend* 806.04 (11) and subchapter VIII (title) of chapter 893 [precedes  
2 893.80]; and *to create* 13.365, 803.09 (2m) and 893.825 of the statutes;  
3 **relating to:** notice to the legislature of claims relating to constitutionality of  
4 statutes and right of the state legislature to intervene.

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***Analysis by the Legislative Reference Bureau***

This bill requires a party that alleges that a statute is unconstitutional to serve the speaker of the assembly, the president of the senate, and the senate majority leader with a copy of the proceeding. The bill also requires that, in such cases, the assembly, the senate, and the state legislature are entitled to be heard.

Under current law, if a statute, ordinance, or franchise is alleged to be unconstitutional, the attorney general must be served with a copy of the proceeding and be entitled to be heard. This requirement exists in the statutes for declaratory judgment acts under s. 806.04 (11). The Wisconsin Supreme Court has also extended the requirement to other types of actions involving claims that a statute is unconstitutional. See *Kurtz v. City of Waukesha*, 91 Wis. 2d 103, 280 N.W.2d 757 (1979). This bill incorporates the *Kurtz* rule into the statutes and extends both the current statutory and *Kurtz* requirements of service and an opportunity to be heard to the legislature.

The bill also provides that when the case involves the constitutionality of a statute, the assembly, the senate, and the state legislature have the right to intervene and participate in the action. Under the bill, the Committee on Assembly Organization may intervene in the action on behalf of the assembly; the Committee

on Senate Organization may intervene in the action on behalf of the senate; and the Joint Committee on Legislative Organization may intervene in the action on behalf of both houses of the state legislature.

Ins  
Analysis

*The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:*

1           **SECTION 1.** 13.365 of the statutes is created to read:

2           **13.365 Intervention.** Pursuant to s. 803.09 (2m), when a party to an action  
3 challenges the constitutionality of a statute:

4           (1) The committee on assembly organization may intervene in the action on  
5 behalf of the assembly. ↑

6           (2) The committee on senate organization may intervene in the action on behalf  
7 of the senate. ↑

8           (3) The joint committee on legislative organization may intervene in the action  
9 on behalf of both houses of the legislature. ↑

10          **SECTION 2.** 803.09 (2m) of the statutes is created to read:

11          **803.09 (2m)** When a party to an action challenges the constitutionality of a  
12 statute, the assembly, the senate, and the state legislature may intervene in the  
13 action as a matter of right by serving a motion upon the parties as provided in s.  
14 801.14 within 45 days of receiving a copy of the proceedings under s. 893.825.

15          **SECTION 3.** 806.04 (11) of the statutes is amended to read:

16          **806.04 (11) PARTIES.** When declaratory relief is sought, all persons shall be  
17 made parties who have or claim any interest which would be affected by the  
18 declaration, and no declaration may prejudice the right of persons not parties to the  
19 proceeding. In any proceeding which involves the validity of a municipal ordinance  
20 or franchise, the municipality shall be made a party, and shall be entitled to be heard.

1 If a statute, ordinance or franchise is alleged to be unconstitutional, the attorney  
2 general shall also be served with a copy of the proceeding and <sup>except as provided</sup> be entitled to be heard. <sup>under</sup>  
3 If a statute is alleged to be unconstitutional, the speaker of the assembly, the <sup>this</sup>  
4 president of the senate, and the senate majority leader shall also be served with a <sup>sub-</sup>  
5 copy of the proceeding and the assembly, the senate, and the state legislature shall <sup>section</sup>  
6 be entitled to be heard. <sup>in lieu of the attorney general</sup> In any proceeding under this section in which the  
7 constitutionality, construction or application of any provision of ch. 227, or of any  
8 statute allowing a legislative committee to suspend, or to delay or prevent the  
9 adoption of, a rule as defined in s. 227.01 (13) is placed in issue by the parties, the  
10 joint committee for review of administrative rules shall be served with a copy of the  
11 petition and, with the approval of the joint committee on legislative organization,  
12 shall be made a party and be entitled to be heard. In any proceeding under this  
13 section in which the constitutionality, construction or application of any provision of  
14 ch. 13, 20, 111, 227 or 230 or subch. I, III or IV of ch. 16 or s. 753.075, or of any statute  
15 allowing a legislative committee to suspend, or to delay or prevent the adoption of,  
16 a rule as defined in s. 227.01 (13) is placed in issue by the parties, the joint committee  
17 on legislative organization shall be served with a copy of the petition and the joint  
18 committee on legislative organization, the senate committee on organization or the  
19 assembly committee on organization may intervene as a party to the proceedings and  
20 be heard.

21 SECTION 4. Subchapter VIII (title) of chapter 893 [precedes 893.80] of the  
22 statutes is amended to read:

23 CHAPTER 893

24 SUBCHAPTER VIII

25 CLAIMS AGAINST GOVERNMENTAL

## 1 BODIES, OFFICERS AND EMPLOYEES;

2 CONSTITUTIONAL CLAIMS

3 SECTION 5. 893.825 of the statutes is created to read:

4 **893.825 Claim alleging a statute is unconstitutional.** If a statute is  
5 alleged to be unconstitutional, the attorney general shall be served with a copy of the  
6 proceeding and be entitled to be heard. If a statute is alleged to be unconstitutional,  
7 the speaker of the assembly, the president of the senate, and the senate majority  
8 leader shall also be served with a copy of the proceeding and the assembly, the senate,  
9 and the state legislature shall be entitled to be heard.

10

(END)

MS  
4-10

**2019-2020 DRAFTING INSERT  
FROM THE  
LEGISLATIVE REFERENCE BUREAU**

LRB-6021/P2ins

RAC:kjl

am

**Insert Analysis:**

The bill also provides that when the case involves the constitutionality of a statute, the assembly, the senate, and the state legislature have the right to intervene and participate in the action and may also retain legal counsel other than the Department of Justice. Under the bill, the Committee on Assembly Organization may intervene in the action, as well as obtain legal counsel, on behalf of the assembly; the Committee on Senate Organization may intervene in the action, as well as obtain legal counsel, on behalf of the senate; and the Joint Committee on Legislative Organization may intervene in the action, as well as obtain legal counsel, on behalf of the legislature.

**Insert 2-5:**

The committee on assembly organization may obtain legal counsel other than from the department of justice, with the cost of representation paid from the appropriation under s. 20.765 (1) (a), to represent the assembly in any action in which the assembly intervenes.

**Insert 2-7:**

The committee on senate organization may obtain legal counsel other than from the department of justice, with the cost of representation paid from the appropriation under s. 20.765 (1) (b), to represent the senate in any action in which the senate intervenes.

**Insert 2-9:**

The joint committee on legislative organization may obtain legal counsel other than from the department of justice, with the cost of representation paid from the appropriation under s. 20.765 (1) (a) or (b), as determined by the cochairpersons, to represent the legislature in any action in which the legislature intervenes.

**Insert 4-10:**

**893.825 Claim alleging a statute is unconstitutional.** (1) If a statute is alleged to be unconstitutional, the attorney general shall be served with a copy of the proceeding and, except as provided in sub. (2), is entitled to be heard.

(2) If a statute is alleged to be unconstitutional, the speaker of the assembly, the president of the senate, and the senate majority leader shall also be served with a copy of the proceeding and the assembly, the senate, and the state legislature are entitled to be heard in lieu of the attorney general.



State of Wisconsin  
2017 - 2018 LEGISLATURE

LRB-6021/P2 P3  
SWB&RAC:kjf&amn

+ CMH

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

Notice to legislature of claims relating to constitutionality of statutes;  
legislative intervention

- 1 **AN ACT to amend** 806.04 (11) and subchapter VIII (title) of chapter 893 [precedes  
2 893.80]; and **to create** 13.365, 803.09 (2m) and 893.825 of the statutes;  
3 **relating to:** notice to the legislature of claims relating to constitutionality of  
4 statutes and right of the state legislature to intervene. and

Insert  
1-4

Title:  
sub-sub

**Analysis by the Legislative Reference Bureau**

This bill requires a party that alleges that a statute is unconstitutional to serve the speaker of the assembly, the president of the senate, and the senate majority leader with a copy of the proceeding. The bill also requires that, in such cases, the assembly, the senate, and the state legislature are entitled to be heard.

Under current law, if a statute, ordinance, or franchise is alleged to be unconstitutional, the attorney general must be served with a copy of the proceeding and be entitled to be heard. This requirement exists in the statutes for declaratory judgment acts under s. 806.04 (11). The Wisconsin Supreme Court has also extended the requirement to other types of actions involving claims that a statute is unconstitutional. See *Kurtz v. City of Waukesha*, 91 Wis. 2d 103, 280 N.W.2d 757 (1979). This bill incorporates the *Kurtz* rule into the statutes and extends both the current statutory and *Kurtz* requirements of service and an opportunity to be heard to the legislature.

The bill also provides that when the case involves the constitutionality of a statute, the assembly, the senate, and the state legislature have the right to intervene and participate in the action and may also retain legal counsel other than the Department of Justice. Under the bill, the Committee on Assembly Organization

JUL Joint Committee on Legislative Organization  
can (JUL)



JCLU  
may intervene in the action, as well as obtain legal counsel, on behalf of the assembly;  
the Committee on Senate Organization may intervene in the action, as well as obtain  
legal counsel, on behalf of the senate; and the ~~Joint Committee on Legislative~~  
~~Organization~~ may intervene in the action, as well as obtain legal counsel, on behalf  
of the legislature. ~~state~~

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*The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:*

1           SECTION 1. 13.365 of the statutes is created to read:

2           **13.365 Intervention.** Pursuant to s. 803.09 (2m), when a party to an action  
3 challenges the constitutionality of a statute:

4           (1) The committee on assembly organization may intervene in the action on  
5 behalf of the assembly. The committee on assembly organization may obtain legal  
6 counsel other than from the department of justice, with the cost of representation  
7 paid from the appropriation under s. 20.765 (1) (a), to represent the assembly in any  
8 action in which the assembly intervenes.

9           (2) The committee on senate organization may intervene in the action on behalf  
10 of the senate. The committee on senate organization may obtain legal counsel other  
11 than from the department of justice, with the cost of representation paid from the  
12 appropriation under s. 20.765 (1) (b), to represent the senate in any action in which  
13 the senate intervenes.

14           (3) The joint committee on legislative organization may intervene in the action  
15 on behalf of ~~both houses of the~~ <sup>state</sup> legislature. The joint committee on legislative  
16 organization may obtain legal counsel other than from the department of justice,  
17 with the cost of representation paid from the appropriation under s. 20.765 (1) (a) or  
18 (b), as determined by the cochairpersons, to represent the ~~legislature~~ <sup>state</sup> in any action  
19 in which the legislature intervenes.

joint committee on legislative organization

Insert  
3-1

1 SECTION 2. 803.09 (2m) of the statutes is created to read:

2 803.09 (2m) When a party to an action challenges the constitutionality of a  
3 statute, the assembly, the senate, and the state legislature may intervene in the  
4 action as a matter of right by serving a motion upon the parties as provided in s.  
5 801.14 within 45 days of receiving a copy of the proceedings under s. 893.825.

6 SECTION 3. 806.04 (11) of the statutes is amended to read:

7 806.04 (11) PARTIES. When declaratory relief is sought, all persons shall be  
8 made parties who have or claim any interest which would be affected by the  
9 declaration, and no declaration may prejudice the right of persons not parties to the  
10 proceeding. In any proceeding which involves the validity of a municipal ordinance  
11 or franchise, the municipality shall be made a party, and shall be entitled to be heard.  
12 If a statute, ordinance or franchise is alleged to be unconstitutional, the attorney  
13 general shall also be served with a copy of the proceeding and, except as provided  
14 under this subsection, be entitled to be heard. If a statute is alleged to be  
15 unconstitutional, the speaker of the assembly, the president of the senate, and the  
16 senate majority leader shall also be served with a copy of the proceeding and the  
17 assembly, the senate, and the state legislature are entitled to be heard in lieu of the  
18 attorney general. In any proceeding under this section in which the constitutionality,  
19 construction or application of any provision of ch. 227, or of any statute allowing a  
20 legislative committee to suspend, or to delay or prevent the adoption of, a rule as  
21 defined in s. 227.01 (13) is placed in issue by the parties, the joint committee for  
22 review of administrative rules shall be served with a copy of the petition and, with  
23 the approval of the joint committee on legislative organization, shall be made a party  
24 and be entitled to be heard. In any proceeding under this section in which the  
25 constitutionality, construction or application of any provision of ch. 13, 20, 111, 227

1 or 230 or subch. I, III or IV of ch. 16 or s. 753.075, or of any statute allowing a  
2 legislative committee to suspend, or to delay or prevent the adoption of, a rule as  
3 defined in s. 227.01 (13) is placed in issue by the parties, the joint committee on  
4 legislative organization shall be served with a copy of the petition and the joint  
5 committee on legislative organization, the senate committee on organization or the  
6 assembly committee on organization may intervene as a party to the proceedings and  
7 be heard.

8 **SECTION 4.** Subchapter VIII (title) of chapter 893 [precedes 893.80] of the  
9 statutes is amended to read:

10 **CHAPTER 893**

11 **SUBCHAPTER VIII**

12 **CLAIMS AGAINST GOVERNMENTAL**

13 **BODIES, OFFICERS AND EMPLOYEES;**

14 **CONSTITUTIONAL CLAIMS**

15 **SECTION 5.** 893.825 of the statutes is created to read:

16 **893.825 Claim alleging a statute is unconstitutional.** (1) If a statute is  
17 alleged to be unconstitutional, the attorney general shall be served with a copy of the  
18 proceeding and, except as provided in sub. (2), is entitled to be heard. *represent the state and*

19 (2) If a statute is alleged to be unconstitutional, the speaker of the assembly,  
20 the president of the senate, and the senate majority leader shall also be served with  
21 a copy of the proceeding and the assembly, the senate, and the *joint committee on legislative organization* state legislature are  
22 entitled to be heard in lieu of the attorney general. *Y*

23 (END)

*The assembly shall represent the assembly, the senate shall represent the senate, and the joint committee on legislative organization shall represent the state.*

*Insert  
4-22*



State of Wisconsin  
2017 - 2018 LEGISLATURE

LRB-6010/P3  
CMH&RAC:amn

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

1 AN ACT *to amend* 165.10, 165.25 (6) (a), 165.25 (6) (e) and 165.25 (12) of the  
2 statutes; **relating to** state settlement moneys and the settlement authority of  
3 the attorney general.

Insert  
1-4

Title  
sub-sub

State settlement moneys and settlement authority of attorney general  
*Analysis by the Legislative Reference Bureau*

Insert  
analyses

Under current law, the Department of Justice deposits settlement funds that are not committed under the terms of the settlement into a DOJ appropriation and may spend the funds only after submitting a plan for the expenditure to the Joint Committee on Finance for passive review. If JCF does not schedule a meeting to review the proposed plan within 14 days, DOJ may expend the funds as provided in the plan. This bill requires that DOJ must deposit all settlement funds into the general fund. This bill also lapses all unencumbered settlement funds that are currently in the DOJ appropriation into the general fund.

DOJ

Current law allows the attorney general to settle and compromise actions as the attorney general determines to be in the best interest of the state. This bill eliminates that authority and instead requires the attorney general to submit any settlement plan to JCF and allows for the settlement only with JCF approval.

The bill further provides that the attorney general may not submit a proposed settlement plan to JCF in which the plan concedes the unconstitutionality or other

*JCLD*  
invalidity of a statute without the approval of the Joint Committee on Legislative Organization.

*Insert 3-1*  
***The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:***

**SECTION 1.** 165.10 of the statutes is amended to read:

**165.10 Limits on expenditure Deposit of discretionary settlement funds.** Notwithstanding s. 20.455 (3), before the The attorney general may expend shall deposit all settlement funds under s. 20.455 (3) (g) that are not committed under the terms of the settlement, the attorney general shall submit to the joint committee on finance a proposed plan for the expenditure of the funds. If the cochairpersons of the committee do not notify the attorney general within 14 working days after the submittal that the committee has scheduled a meeting for the purpose of reviewing the proposed plan, the attorney general may expend the funds to implement the proposed plan. If, within 14 working days after the submittal, the cochairpersons of the committee notify the attorney general that the committee has scheduled a meeting for the purpose of reviewing the proposed plan, the attorney general may expend the funds only to implement the plan as approved by the committee into the general fund.

**SECTION 2.** 165.25 (6) (a) of the statutes is amended to read:

**165.25 (6) (a) 1.** At the request of the head of any department of state government, the attorney general may appear for and defend any state department, or any state officer, employee, or agent of the department in any civil action or other matter brought before a court or an administrative agency which is brought against the state department, or officer, employee, or agent for or on account of any act growing out of or committed in the lawful course of an officer's, employee's, or agent's

1 duties. Witness fees or other expenses determined by the attorney general to be  
2 reasonable and necessary to the defense in the action or proceeding shall be paid as  
3 provided for in s. 885.07.

4 2. The attorney general may compromise and settle the action ~~as the attorney~~  
5 ~~general determines to be in the best interest of the state by submitting a proposed~~  
6 ~~settlement plan to the joint committee on finance for the approval of the committee.~~  
7 The attorney general may compromise or settle the action only if the joint committee  
8 on finance approves the proposed settlement plan. The attorney general may not  
9 submit a proposed settlement plan to the joint committee on finance under this  
10 subdivision in which the plan concedes the unconstitutionality or other invalidity of  
11 a statute without the approval of the joint committee on legislative organization.

12 3. Members, officers, and employees of the Wisconsin state agencies building  
13 corporation and the Wisconsin state public building corporation are covered by this  
14 section. Members of the board of governors created under s. 619.04 (3), members of  
15 a committee or subcommittee of that board of governors, members of the injured  
16 patients and families compensation fund peer review council created under s.  
17 655.275 (2), and persons consulting with that council under s. 655.275 (5) (b) are  
18 covered by this section with respect to actions, claims, or other matters arising  
19 before, on, or after April 25, 1990. The attorney general may, as provided under subd.  
20 2., compromise and settle claims asserted before such actions or matters formally are  
21 brought or may delegate such authority to the department of administration. This  
22 paragraph may not be construed as a consent to sue the state or any department  
23 thereof or as a waiver of state sovereign immunity.

24 SECTION 3. 165.25 (6) (e) of the statutes is amended to read:

Insert  
3-1  
cont.

**SECTION 3**

Insert  
3-1  
Cont.

1 165.25 (6) (e) The department of justice may appear for and defend the state  
2 or any state department, agency, official or employee in any civil action arising out  
3 of or relating to the assessment or collection of costs concerning environmental  
4 cleanup or natural resources damages including actions brought under 42 USC 9607.  
5 The action may be compromised and settled in the same manner as provided in par.  
6 (a) 2. At the request of the department of natural resources, the department of justice  
7 may provide legal representation to the state or to the department of natural  
8 resources in the same matter in which the department of justice provides defense  
9 counsel, if the attorneys representing those interests are assigned from different  
10 organizational units within the department of justice. This paragraph may not be  
11 construed as a consent to sue the state or any department, agency, official or  
12 employee of the state or as a waiver of sovereign immunity.

13 **SECTION 4.** 165.25 (12) of the statutes is amended to read:

14 165.25 (12) REPRESENTATION ARISING FROM AGREEMENTS WITH MINNESOTA.  
15 Represent any employee of the state of Minnesota who is named as a defendant in  
16 any civil action brought under the laws of this state as a result of performing services  
17 for this state under a valid agreement between this state and the state of Minnesota  
18 providing for interchange of employees or services and any employee of this state who  
19 is named as a defendant as a result of performing services for the state of Minnesota  
20 under such an agreement in any action brought under the laws of this state. Witness  
21 fees in any action specified in this subsection shall be paid in the same manner as  
22 provided in s. 885.07. The attorney general may compromise and settle any action  
23 specified in this subsection to the same extent as provided in s. 165.25 (6) (a) 2.

24 Insert  
4-22  
**SECTION 5. Fiscal changes.**

Insert  
4-22  
(cont.)

1  
2  
3  
4  
5

(1) Notwithstanding s. 20.001 (3) (c), from the appropriation account under s. 20.455 (3) (g), on the effective date of this subsection, there is lapsed to the general fund the unencumbered balance of any settlement funds in that appropriation account, as determined by the attorney general.

(END)





State of Wisconsin  
2017 - 2018 LEGISLATURE

LRB-6021/P3 P4  
SWB/RAC/CMH:kjf&amn  
kfay/cs

8:50 am

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

- 1 AN ACT *to amend* 165.10, 165.25 (6) (a), 165.25 (6) (e), 165.25 (12), 806.04 (11)  
2 and subchapter VIII (title) of chapter 893 [precedes 893.80]; and *to create*  
3 13.365, 803.09 (2m) and 893.825 of the statutes; **relating to:** notice to the  
4 legislature of claims relating to constitutionality of statutes and right of the  
5 state legislature to intervene and state settlement moneys and the settlement  
6 authority of the attorney general.

*Analysis by the Legislative Reference Bureau*

***Notice to legislature of claims relating to constitutionality of statutes;  
legislative intervention***

→ This bill requires a party that alleges that a statute is unconstitutional to serve the speaker of the assembly, the president of the senate, and the senate majority leader with a copy of the proceeding. The bill also requires that, in such cases, the assembly, the senate, and the Joint Committee on Legislative Organization (JCLO) are entitled to be heard. *representing the legislature and the state*

Under current law, if a statute, ordinance, or franchise is alleged to be unconstitutional, the attorney general must be served with a copy of the proceeding and be entitled to be heard. This requirement exists in the statutes for declaratory judgment acts under s. 806.04 (11). The Wisconsin Supreme Court has also extended the requirement to other types of actions involving claims that a statute is unconstitutional. See *Kurtz v. City of Waukesha*, 91 Wis. 2d 103, 280 N.W.2d 757

(1979). This bill incorporates the *Kurtz* rule into the statutes and extends both the current statutory and *Kurtz* requirements of service and an opportunity to be heard to the legislature.

The bill also provides that when the case involves the constitutionality of a statute, the assembly, the senate, and JCLO have the right to intervene and participate in the action and may also retain legal counsel other than the Department of Justice. Under the bill, the Committee on Assembly Organization may intervene in the action, as well as obtain legal counsel, on behalf of the assembly; the Committee on Senate Organization may intervene in the action, as well as obtain legal counsel, on behalf of the senate; and JCLO may intervene in the action, as well as obtain legal counsel, on behalf of the state.

***State settlement moneys and settlement authority of attorney general***

Under current law, DOJ deposits settlement funds that are not committed under the terms of the settlement into a DOJ appropriation and may spend the funds only after submitting a plan for the expenditure to the Joint Committee on Finance for passive review. If JCF does not schedule a meeting to review the proposed plan within 14 days, DOJ may expend the funds as provided in the plan. This bill requires that DOJ must deposit all settlement funds into the general fund. This bill also lapses all unencumbered settlement funds that are currently in the DOJ appropriation into the general fund.

Current law allows the attorney general to settle and compromise actions as the attorney general determines to be in the best interest of the state. This bill eliminates that authority and instead requires the attorney general to submit any settlement plan to JCF and allows for the settlement only with JCF approval.

The bill further provides that the attorney general may not submit a proposed settlement plan to JCF in which the plan concedes the unconstitutionality or other invalidity of a statute without the approval of JCLO.

---

***The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:***

- 1           **SECTION 1.** 13.365 of the statutes is created to read:
- 2           **13.365 Intervention.** Pursuant to s. 803.09 (2m), when a party to an action
- 3 challenges the constitutionality of a statute:
- 4           **(1)** The committee on assembly organization may intervene in the action on
- 5 behalf of the assembly. The committee on assembly organization may obtain legal
- 6 counsel other than from the department of justice, with the cost of representation

1 paid from the appropriation under s. 20.765 (1) (a), to represent the assembly in any  
2 action in which the assembly intervenes.

3 (2) The committee on senate organization may intervene in the action on behalf  
4 of the senate. The committee on senate organization may obtain legal counsel other  
5 than from the department of justice, with the cost of representation paid from the  
6 appropriation under s. 20.765 (1) (b), to represent the senate in any action in which  
7 the senate intervenes.

8 (3) The joint committee on legislative organization may intervene in the action  
9 on behalf of the state. The joint committee on legislative organization may obtain  
10 legal counsel other than from the department of justice, with the cost of  
11 representation paid from the appropriation under s. 20.765 (1) (a) or (b), as  
12 determined by the cochairpersons, to represent the state in any action in which the  
13 joint committee on legislative organization intervenes.

14 **SECTION 2.** 165.10 of the statutes is amended to read:

15 **165.10 ~~Limits on expenditure~~ Deposit of discretionary settlement**  
16 **~~funds.~~** Notwithstanding s. 20.455 (3), before the The attorney general may expend  
17 shall deposit all settlement funds under s. 20.455 (3) (g) ~~that are not committed~~  
18 ~~under the terms of the settlement, the attorney general shall submit to the joint~~  
19 ~~committee on finance a proposed plan for the expenditure of the funds. If the~~  
20 ~~cochairpersons of the committee do not notify the attorney general within 14 working~~  
21 ~~days after the submittal that the committee has scheduled a meeting for the purpose~~  
22 ~~of reviewing the proposed plan, the attorney general may expend the funds to~~  
23 ~~implement the proposed plan. If, within 14 working days after the submittal, the~~  
24 ~~cochairpersons of the committee notify the attorney general that the committee has~~  
25 ~~scheduled a meeting for the purpose of reviewing the proposed plan, the attorney~~

1 ~~general may expend the funds only to implement the plan as approved by the~~  
2 ~~committee into the general fund.~~

3 SECTION 3. 165.25 (6) (a) of the statutes is amended to read:

4 165.25 (6) (a) 1. Except as provided in s. 893.825 (2), at  
5 ~~At~~ the request of the head of any department of state  
6 government, the attorney general may appear for and defend any state department,  
7 or any state officer, employee, or agent of the department in any civil action or other  
8 matter brought before a court or an administrative agency which is brought against  
9 the state department, or officer, employee, or agent for or on account of any act  
10 growing out of or committed in the lawful course of an officer's, employee's, or agent's  
11 duties. Witness fees or other expenses determined by the attorney general to be  
12 reasonable and necessary to the defense in the action or proceeding shall be paid as  
13 provided for in s. 885.07.

14 2. The attorney general may compromise and settle the action as the attorney  
15 general determines to be in the best interest of the state by submitting a proposed  
16 settlement plan to the joint committee on finance for the approval of the committee.  
17 The attorney general may compromise or settle the action only if the joint committee  
18 on finance approves the proposed settlement plan. The attorney general may not  
19 submit a proposed settlement plan to the joint committee on finance under this  
20 subdivision in which the plan concedes the unconstitutionality or other invalidity of  
21 a statute without the approval of the joint committee on legislative organization.

22 3. Members, officers, and employees of the Wisconsin state agencies building  
23 corporation and the Wisconsin state public building corporation are covered by this  
24 section. Members of the board of governors created under s. 619.04 (3), members of  
25 a committee or subcommittee of that board of governors, members of the injured  
patients and families compensation fund peer review council created under s.

1 655.275 (2), and persons consulting with that council under s. 655.275 (5) (b) are  
2 covered by this section with respect to actions, claims, or other matters arising  
3 before, on, or after April 25, 1990. The attorney general may, as provided under subd.  
4 2., compromise and settle claims asserted before such actions or matters formally are  
5 brought or may delegate such authority to the department of administration. This  
6 paragraph may not be construed as a consent to sue the state or any department  
7 thereof or as a waiver of state sovereign immunity.

8 **SECTION 4.** 165.25 (6) (e) of the statutes is amended to read:

9 165.25 (6) (e) The department of justice may appear for and defend the state  
10 or any state department, agency, official or employee in any civil action arising out  
11 of or relating to the assessment or collection of costs concerning environmental  
12 cleanup or natural resources damages including actions brought under 42 USC 9607.  
13 The action may be compromised and settled in the same manner as provided in par.  
14 (a) 2. At the request of the department of natural resources, the department of justice  
15 may provide legal representation to the state or to the department of natural  
16 resources in the same matter in which the department of justice provides defense  
17 counsel, if the attorneys representing those interests are assigned from different  
18 organizational units within the department of justice. This paragraph may not be  
19 construed as a consent to sue the state or any department, agency, official or  
20 employee of the state or as a waiver of sovereign immunity.

21 **SECTION 5.** 165.25 (12) of the statutes is amended to read:

22 165.25 (12) REPRESENTATION ARISING FROM AGREEMENTS WITH MINNESOTA.  
23 Represent any employee of the state of Minnesota who is named as a defendant in  
24 any civil action brought under the laws of this state as a result of performing services  
25 for this state under a valid agreement between this state and the state of Minnesota

1 providing for interchange of employees or services and any employee of this state who  
2 is named as a defendant as a result of performing services for the state of Minnesota  
3 under such an agreement in any action brought under the laws of this state. Witness  
4 fees in any action specified in this subsection shall be paid in the same manner as  
5 provided in s. 885.07. The attorney general may compromise and settle any action  
6 specified in this subsection to the same extent as provided in s. 165.25 (6) (a) 2.

7 **SECTION 6.** 803.09 (2m) of the statutes is created to read:

8 803.09 (2m) When a party to an action challenges the constitutionality of a  
9 statute, the assembly, the senate, and the state legislature may intervene in the  
10 action as a matter of right by serving a motion upon the parties as provided in s.  
11 801.14 within 45 days of receiving a copy of the proceedings under s. 893.825.

12 **SECTION 7.** 806.04 (11) of the statutes is amended to read:

13 806.04 (11) PARTIES. When declaratory relief is sought, all persons shall be  
14 made parties who have or claim any interest which would be affected by the  
15 declaration, and no declaration may prejudice the right of persons not parties to the  
16 proceeding. In any proceeding which involves the validity of a municipal ordinance  
17 or franchise, the municipality shall be made a party, and shall be entitled to be heard.  
18 If a statute, ordinance or franchise is alleged to be unconstitutional, the attorney  
19 general shall also be served with a copy of the proceeding and, except as provided  
20 under this subsection, be entitled to be heard. If a statute is alleged to be  
21 unconstitutional, the speaker of the assembly, the president of the senate, and the  
22 senate majority leader shall also be served with a copy of the proceeding and the  
23 assembly, the senate, and the state legislature are entitled to be heard in lieu of the  
24 attorney general. In any proceeding under this section in which the constitutionality,  
25 construction or application of any provision of ch. 227, or of any statute allowing a

1 legislative committee to suspend, or to delay or prevent the adoption of, a rule as  
2 defined in s. 227.01 (13) is placed in issue by the parties, the joint committee for  
3 review of administrative rules shall be served with a copy of the petition and, with  
4 the approval of the joint committee on legislative organization, shall be made a party  
5 and be entitled to be heard. In any proceeding under this section in which the  
6 constitutionality, construction or application of any provision of ch. 13, 20, 111, 227  
7 or 230 or subch. I, III or IV of ch. 16 or s. 753.075, or of any statute allowing a  
8 legislative committee to suspend, or to delay or prevent the adoption of, a rule as  
9 defined in s. 227.01 (13) is placed in issue by the parties, the joint committee on  
10 legislative organization shall be served with a copy of the petition and the joint  
11 committee on legislative organization, the senate committee on organization or the  
12 assembly committee on organization may intervene as a party to the proceedings and  
13 be heard.

14 **SECTION 8.** Subchapter VIII (title) of chapter 893 [precedes 893.80] of the  
15 statutes is amended to read:

16 **CHAPTER 893**

17 **SUBCHAPTER VIII**

18 **CLAIMS AGAINST GOVERNMENTAL**

19 **BODIES, OFFICERS AND EMPLOYEES;**

20 **CONSTITUTIONAL CLAIMS**

21 **SECTION 9.** 893.825 of the statutes is created to read:

22 **893.825 Claim alleging a statute is unconstitutional.** (1) If a statute is  
23 alleged to be unconstitutional, the attorney general shall be served with a copy of the  
24 proceeding and, except as provided in sub. (2), is entitled to represent the state and  
25 be heard.

(2) If a statute is alleged to be unconstitutional, the speaker of the assembly, the president of the senate, and the senate majority leader shall also be served with a copy of the proceeding and the assembly, the senate, and the joint committee on legislative organization are entitled to be heard in lieu of the attorney general. The assembly shall represent the assembly, the senate shall represent of the senate, and the joint committee on legislative organization shall represent of the state.

**SECTION 10. Fiscal changes.**

(1) Notwithstanding s. 20.001 (3) (c), from the appropriation account under s. 20.455 (3) (g), on the effective date of this subsection, there is lapsed to the general fund the unencumbered balance of any settlement funds in that appropriation account, as determined by the attorney general.

**(END)**





State of Wisconsin  
2017 - 2018 LEGISLATURE

LRB-6021/P4  
SWB/RAC/CMH:kf/an/cs

**PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION**

1     **AN ACT** *to amend* 165.10, 165.25 (6) (a), 165.25 (6) (e), 165.25 (12), 806.04 (11)  
2             and subchapter VIII (title) of chapter 893 [precedes 893.80]; and *to create*  
3             13.365, 803.09 (2m) and 893.825 of the statutes; **relating to:** notice to the  
4             legislature of claims relating to constitutionality of statutes and right of the  
5             legislature to intervene and state settlement moneys and the settlement  
6             authority of the attorney general.

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***Analysis by the Legislative Reference Bureau***

***Notice to legislature of claims relating to constitutionality of statutes;  
legislative intervention***

This bill requires a party that alleges that a statute is unconstitutional to serve the speaker of the assembly, the president of the senate, and the senate majority leader with a copy of the proceeding. The bill also requires that, in such cases, the assembly, the senate, and the Joint Committee on Legislative Organization (JCLO) are entitled to be heard, representing the legislature and the state.

Under current law, if a statute, ordinance, or franchise is alleged to be unconstitutional, the attorney general must be served with a copy of the proceeding and be entitled to be heard. This requirement exists in the statutes for declaratory judgment acts under s. 806.04 (11). The Wisconsin Supreme Court has also extended the requirement to other types of actions involving claims that a statute is unconstitutional. See *Kurtz v. City of Waukesha*, 91 Wis. 2d 103, 280 N.W.2d 757

(1979). This bill incorporates the *Kurtz* rule into the statutes and extends both the current statutory and *Kurtz* requirements of service and an opportunity to be heard to the legislature.

The bill also provides that when the case involves the constitutionality of a statute, the assembly, the senate, and JCLO have the right to intervene and participate in the action and may also retain legal counsel other than the Department of Justice. Under the bill, the Committee on Assembly Organization may intervene in the action, as well as obtain legal counsel, on behalf of the assembly; the Committee on Senate Organization may intervene in the action, as well as obtain legal counsel, on behalf of the senate; and JCLO may intervene in the action, as well as obtain legal counsel, on behalf of the state.

***State settlement moneys and settlement authority of attorney general***

Under current law, DOJ deposits settlement funds that are not committed under the terms of the settlement into a DOJ appropriation and may spend the funds only after submitting a plan for the expenditure to the Joint Committee on Finance for passive review. If JCF does not schedule a meeting to review the proposed plan within 14 days, DOJ may expend the funds as provided in the plan. This bill requires that DOJ must deposit all settlement funds into the general fund. This bill also lapses all unencumbered settlement funds that are currently in the DOJ appropriation into the general fund.

Current law allows the attorney general to settle and compromise actions as the attorney general determines to be in the best interest of the state. This bill eliminates that authority and instead requires the attorney general to submit any settlement plan to JCF and allows for the settlement only with JCF approval.

The bill further provides that the attorney general may not submit a proposed settlement plan to JCF in which the plan concedes the unconstitutionality or other invalidity of a statute without the approval of JCLO.

---

***The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:***

1           **SECTION 1.** 13.365 of the statutes is created to read:

2           **13.365 Intervention.** Pursuant to s. 803.09 (2m), when a party to an action  
3 challenges the constitutionality of a statute:

4           (1) The committee on assembly organization may intervene in the action on  
5 behalf of the assembly. The committee on assembly organization may obtain legal  
6 counsel other than from the department of justice, with the cost of representation

1 paid from the appropriation under s. 20.765 (1) (a), to represent the assembly in any  
2 action in which the assembly intervenes.

3 (2) The committee on senate organization may intervene in the action on behalf  
4 of the senate. The committee on senate organization may obtain legal counsel other  
5 than from the department of justice, with the cost of representation paid from the  
6 appropriation under s. 20.765 (1) (b), to represent the senate in any action in which  
7 the senate intervenes.

8 (3) The joint committee on legislative organization may intervene in the action  
9 on behalf of the state. The joint committee on legislative organization may obtain  
10 legal counsel other than from the department of justice, with the cost of  
11 representation paid from the appropriation under s. 20.765 (1) (a) or (b), as  
12 determined by the cochairpersons, to represent the state in any action in which the  
13 joint committee on legislative organization intervenes.

14 **SECTION 2.** 165.10 of the statutes is amended to read:

15 **165.10 Limits on expenditure Deposit of discretionary settlement**  
16 **funds.** Notwithstanding s. 20.455 (3), before the ~~The~~ attorney general may expend  
17 ~~shall deposit all~~ settlement funds under s. 20.455 (3) (g) that are not committed  
18 under the terms of the settlement, the attorney general shall submit to the joint  
19 committee on finance a proposed plan for the expenditure of the funds. If the  
20 cochairpersons of the committee do not notify the attorney general within 14 working  
21 days after the submittal that the committee has scheduled a meeting for the purpose  
22 of reviewing the proposed plan, the attorney general may expend the funds to  
23 implement the proposed plan. If, within 14 working days after the submittal, the  
24 cochairpersons of the committee notify the attorney general that the committee has  
25 scheduled a meeting for the purpose of reviewing the proposed plan, the attorney

1 ~~general may expend the funds only to implement the plan as approved by the~~  
2 ~~committee into the general fund.~~

3 **SECTION 3.** 165.25 (6) (a) of the statutes is amended to read:

4 165.25 (6) (a) ~~At 1. Except as provided in s. 893.825 (2),~~ at the request of the  
5 head of any department of state government, the attorney general may appear for  
6 and defend any state department, or any state officer, employee, or agent of the  
7 department in any civil action or other matter brought before a court or an  
8 administrative agency which is brought against the state department, or officer,  
9 employee, or agent for or on account of any act growing out of or committed in the  
10 lawful course of an officer's, employee's, or agent's duties. Witness fees or other  
11 expenses determined by the attorney general to be reasonable and necessary to the  
12 defense in the action or proceeding shall be paid as provided for in s. 885.07.

13 2. The attorney general may compromise and settle the action as ~~the attorney~~  
14 ~~general determines to be in the best interest of the state by submitting a proposed~~  
15 ~~settlement plan to the joint committee on finance for the approval of the committee.~~  
16 The attorney general may compromise or settle the action only if the joint committee  
17 on finance approves the proposed settlement plan. The attorney general may not  
18 submit a proposed settlement plan to the joint committee on finance under this  
19 subdivision in which the plan concedes the unconstitutionality or other invalidity of  
20 a statute without the approval of the joint committee on legislative organization.

21 3. Members, officers, and employees of the Wisconsin state agencies building  
22 corporation and the Wisconsin state public building corporation are covered by this  
23 section. Members of the board of governors created under s. 619.04 (3), members of  
24 a committee or subcommittee of that board of governors, members of the injured  
25 patients and families compensation fund peer review council created under s.

1 655.275 (2), and persons consulting with that council under s. 655.275 (5) (b) are  
2 covered by this section with respect to actions, claims, or other matters arising  
3 before, on, or after April 25, 1990. The attorney general may, as provided under subd.  
4 2., compromise and settle claims asserted before such actions or matters formally are  
5 brought or may delegate such authority to the department of administration. This  
6 paragraph may not be construed as a consent to sue the state or any department  
7 thereof or as a waiver of state sovereign immunity.

8 **SECTION 4.** 165.25 (6) (e) of the statutes is amended to read:

9 165.25 (6) (e) The department of justice may appear for and defend the state  
10 or any state department, agency, official or employee in any civil action arising out  
11 of or relating to the assessment or collection of costs concerning environmental  
12 cleanup or natural resources damages including actions brought under 42 USC 9607.  
13 The action may be compromised and settled in the same manner as provided in par.  
14 (a) 2. At the request of the department of natural resources, the department of justice  
15 may provide legal representation to the state or to the department of natural  
16 resources in the same matter in which the department of justice provides defense  
17 counsel, if the attorneys representing those interests are assigned from different  
18 organizational units within the department of justice. This paragraph may not be  
19 construed as a consent to sue the state or any department, agency, official or  
20 employee of the state or as a waiver of sovereign immunity.

21 **SECTION 5.** 165.25 (12) of the statutes is amended to read:

22 165.25 (12) REPRESENTATION ARISING FROM AGREEMENTS WITH MINNESOTA.  
23 Represent any employee of the state of Minnesota who is named as a defendant in  
24 any civil action brought under the laws of this state as a result of performing services  
25 for this state under a valid agreement between this state and the state of Minnesota

1 providing for interchange of employees or services and any employee of this state who  
2 is named as a defendant as a result of performing services for the state of Minnesota  
3 under such an agreement in any action brought under the laws of this state. Witness  
4 fees in any action specified in this subsection shall be paid in the same manner as  
5 provided in s. 885.07. The attorney general may compromise and settle any action  
6 specified in this subsection to the same extent as provided in s. 165.25 (6) (a) 2.

7 **SECTION 6.** 803.09 (2m) of the statutes is created to read:

8 803.09 (2m) When a party to an action challenges the constitutionality of a  
9 statute, the assembly, the senate, and the state legislature may intervene in the  
10 action as a matter of right by serving a motion upon the parties as provided in s.  
11 801.14 within 45 days of receiving a copy of the proceedings under s. 893.825.

12 **SECTION 7.** 806.04 (11) of the statutes is amended to read:

13 806.04 (11) PARTIES. When declaratory relief is sought, all persons shall be  
14 made parties who have or claim any interest which would be affected by the  
15 declaration, and no declaration may prejudice the right of persons not parties to the  
16 proceeding. In any proceeding which involves the validity of a municipal ordinance  
17 or franchise, the municipality shall be made a party, and shall be entitled to be heard.  
18 If a statute, ordinance or franchise is alleged to be unconstitutional, the attorney  
19 general shall also be served with a copy of the proceeding and, except as provided  
20 under this subsection, be entitled to be heard. If a statute is alleged to be  
21 unconstitutional, the speaker of the assembly, the president of the senate, and the  
22 senate majority leader shall also be served with a copy of the proceeding and the  
23 assembly, the senate, and the state legislature are entitled to be heard in lieu of the  
24 attorney general. In any proceeding under this section in which the constitutionality,  
25 construction or application of any provision of ch. 227, or of any statute allowing a

1 legislative committee to suspend, or to delay or prevent the adoption of, a rule as  
2 defined in s. 227.01 (13) is placed in issue by the parties, the joint committee for  
3 review of administrative rules shall be served with a copy of the petition and, with  
4 the approval of the joint committee on legislative organization, shall be made a party  
5 and be entitled to be heard. In any proceeding under this section in which the  
6 constitutionality, construction or application of any provision of ch. 13, 20, 111, 227  
7 or 230 or subch. I, III or IV of ch. 16 or s. 753.075, or of any statute allowing a  
8 legislative committee to suspend, or to delay or prevent the adoption of, a rule as  
9 defined in s. 227.01 (13) is placed in issue by the parties, the joint committee on  
10 legislative organization shall be served with a copy of the petition and the joint  
11 committee on legislative organization, the senate committee on organization or the  
12 assembly committee on organization may intervene as a party to the proceedings and  
13 be heard.

14 **SECTION 8.** Subchapter VIII (title) of chapter 893 [precedes 893.80] of the  
15 statutes is amended to read:

16 **CHAPTER 893**

17 **SUBCHAPTER VIII**

18 **CLAIMS AGAINST GOVERNMENTAL**

19 **BODIES, OFFICERS AND EMPLOYEES;**

20 **CONSTITUTIONAL CLAIMS**

21 **SECTION 9.** 893.825 of the statutes is created to read:

22 **893.825 Claim alleging a statute is unconstitutional.** (1) If a statute is  
23 alleged to be unconstitutional, the attorney general shall be served with a copy of the  
24 proceeding and, except as provided in sub. (2), is entitled to represent the state and  
25 be heard.

(2) If a statute is alleged to be unconstitutional, the speaker of the assembly, the president of the senate, and the senate majority leader shall also be served with a copy of the proceeding and the assembly, the senate, and the joint committee on legislative organization are entitled to be heard in lieu of the attorney general. The assembly shall represent the assembly, the senate shall represent the senate, and the joint committee on legislative organization shall represent the state.

**SECTION 10. Fiscal changes.**

(1) Notwithstanding s. 20.001 (3) (c), from the appropriation account under s. 20.455 (3) (g), on the effective date of this subsection, there is lapsed to the general fund the unencumbered balance of any settlement funds in that appropriation account, as determined by the attorney general.

**(END)**





State of Wisconsin  
2017 - 2018 LEGISLATURE

LRB-6021/P4  
SWB/RAC/CMH:kf/an/cs/ae

p5

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

roger

1 AN ACT *to amend* 165.10, 165.25 (6) (a), 165.25 (6) (e), 165.25 (12), 806.04 (11)  
2 and subchapter VIII (title) of chapter 893 [precedes 893.80]; and *to create*  
3 13.365, 803.09 (2m) and 893.825 of the statutes; **relating to:** notice to the  
4 legislature of claims relating to constitutionality of statutes and right of the  
5 legislature to intervene and state settlement moneys and the settlement  
6 authority of the attorney general.

---

*Analysis by the Legislative Reference Bureau*

***Notice to legislature of claims relating to constitutionality of statutes;  
legislative intervention***

This bill requires a party that alleges that a statute is unconstitutional to serve the speaker of the assembly, the president of the senate, and the senate majority leader with a copy of the proceeding. The bill also requires that, in such cases, the assembly, the senate, and the Joint Committee on Legislative Organization (JCLO) are entitled to be heard, representing the legislature and the state.

Under current law, if a statute, ordinance, or franchise is alleged to be unconstitutional, the attorney general must be served with a copy of the proceeding and be entitled to be heard. This requirement exists in the statutes for declaratory judgment acts under s. 806.04 (11). The Wisconsin Supreme Court has also extended the requirement to other types of actions involving claims that a statute is unconstitutional. See *Kurtz v. City of Waukesha*, 91 Wis. 2d 103, 280 N.W.2d 757

(1979). This bill incorporates the *Kurtz* rule into the statutes and extends both the current statutory and *Kurtz* requirements of service and an opportunity to be heard to the legislature.

Facially or as applied as part of a claim or affirmative defense

When a statute is alleged to be unconstitutional

a party challenges

The bill also provides that when the case involves the constitutionality of a statute, the assembly, the senate, and JCLO have the right to intervene and participate in the action and may also retain legal counsel other than the Department of Justice. Under the bill, the Committee on Assembly Organization may intervene in the action, as well as obtain legal counsel, on behalf of the assembly; the Committee on Senate Organization may intervene in the action, as well as obtain legal counsel, on behalf of the senate; and JCLO may intervene in the action, as well as obtain legal counsel, on behalf of the state.

### ***State settlement moneys and settlement authority of attorney general***

Under current law, DOJ deposits settlement funds that are not committed under the terms of the settlement into a DOJ appropriation and may spend the funds only after submitting a plan for the expenditure to the Joint Committee on Finance for passive review. If JCF does not schedule a meeting to review the proposed plan within 14 days, DOJ may expend the funds as provided in the plan. This bill requires that DOJ must deposit all settlement funds into the general fund. This bill also lapses all unencumbered settlement funds that are currently in the DOJ appropriation into the general fund.

Current law allows the attorney general to settle and compromise actions as the attorney general determines to be in the best interest of the state. This bill eliminates that authority and instead requires the attorney general to submit any settlement plan to JCF and allows for the settlement only with JCF approval.

The bill further provides that the attorney general may not submit a proposed settlement plan to JCF in which the plan concedes the unconstitutionality or other invalidity of a statute without the approval of JCLO.

***The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:***

1           **SECTION 1.** 13.365 of the statutes is created to read:

2           **13.365 Intervention.** Pursuant to s. 803.09 (2m), when a party to an action

3 challenges the constitutionality of a statute: *facially or as applied, as part of a claim or affirmative defense*

4           (1) The committee on assembly organization may intervene in the action on

5 behalf of the assembly. The committee on assembly organization may obtain legal

6 counsel other than from the department of justice, with the cost of representation

1 paid from the appropriation under s. 20.765 (1) (a), to represent the assembly in any  
2 action in which the assembly intervenes.

3 (2) The committee on senate organization may intervene in the action on behalf  
4 of the senate. The committee on senate organization may obtain legal counsel other  
5 than from the department of justice, with the cost of representation paid from the  
6 appropriation under s. 20.765 (1) (b), to represent the senate in any action in which  
7 the senate intervenes.

8 (3) The joint committee on legislative organization may intervene in the action  
9 on behalf of the state. The joint committee on legislative organization may obtain  
10 legal counsel other than from the department of justice, with the cost of  
11 representation paid from the appropriation under s. 20.765 (1) (a) or (b), as  
12 determined by the cochairpersons, to represent the state in any action in which the  
13 joint committee on legislative organization intervenes.

✓ 14 SECTION 2. 165.10 of the statutes is amended to read:  
IN 15

3-14 16 **165.10 ~~Limits on expenditure~~ Deposit of discretionary settlement**  
17 **funds.** Notwithstanding s. 20.455 (3), before the The attorney general may expend  
18 shall deposit all settlement funds under s. 20.455 (3) (g) that are not committed  
19 under the terms of the settlement, the attorney general shall submit to the joint  
20 committee on finance a proposed plan for the expenditure of the funds. If the  
21 cochairpersons of the committee do not notify the attorney general within 14 working  
22 days after the submittal that the committee has scheduled a meeting for the purpose  
23 of reviewing the proposed plan, the attorney general may expend the funds to  
24 implement the proposed plan. If, within 14 working days after the submittal, the  
25 cochairpersons of the committee notify the attorney general that the committee has  
scheduled a meeting for the purpose of reviewing the proposed plan, the attorney

1 ~~general may expend the funds only to implement the plan as approved by the~~  
2 ~~committee into the general fund.~~

3 SECTION 3. 165.25 (6) (a) of the statutes is amended to read:

4 165.25 (6) (a) ~~At 1.~~ Except as provided in s. 893.825 (2), at the request of the  
5 head of any department of state government, the attorney general may appear for  
6 and defend any state department, or any state officer, employee, or agent of the  
7 department in any civil action or other matter brought before a court or an  
8 administrative agency which is brought against the state department, or officer,  
9 employee, or agent for or on account of any act growing out of or committed in the  
10 lawful course of an officer's, employee's, or agent's duties. Witness fees or other  
11 expenses determined by the attorney general to be reasonable and necessary to the  
12 defense in the action or proceeding shall be paid as provided for in s. 885.07.

13 2. The attorney general may compromise and settle the action as the attorney  
14 general determines to be in the best interest of the state by submitting a proposed  
15 settlement plan to the joint committee on finance for the approval of the committee.  
16 The attorney general may compromise or settle the action only if the joint committee  
17 on finance approves the proposed settlement plan. The attorney general may not  
18 submit a proposed settlement plan to the joint committee on finance under this  
19 subdivision in which the plan concedes the unconstitutionality or other invalidity of  
20 a statute without the approval of the joint committee on legislative organization.

21 3. Members, officers, and employees of the Wisconsin state agencies building  
22 corporation and the Wisconsin state public building corporation are covered by this  
23 section. Members of the board of governors created under s. 619.04 (3), members of  
24 a committee or subcommittee of that board of governors, members of the injured  
25 patients and families compensation fund peer review council created under s.

1 655.275 (2), and persons consulting with that council under s. 655.275 (5) (b) are  
2 covered by this section with respect to actions, claims, or other matters arising  
3 before, on, or after April 25, 1990. The attorney general may, as provided under subd.  
4 2., compromise and settle claims asserted before such actions or matters formally are  
5 brought or may delegate such authority to the department of administration. This  
6 paragraph may not be construed as a consent to sue the state or any department  
7 thereof or as a waiver of state sovereign immunity.

8 **SECTION 4.** 165.25 (6) (e) of the statutes is amended to read:

9 165.25 (6) (e) The department of justice may appear for and defend the state  
10 or any state department, agency, official or employee in any civil action arising out  
11 of or relating to the assessment or collection of costs concerning environmental  
12 cleanup or natural resources damages including actions brought under 42 USC 9607.  
13 The action may be compromised and settled in the same manner as provided in par.  
14 (a) 2. At the request of the department of natural resources, the department of justice  
15 may provide legal representation to the state or to the department of natural  
16 resources in the same matter in which the department of justice provides defense  
17 counsel, if the attorneys representing those interests are assigned from different  
18 organizational units within the department of justice. This paragraph may not be  
19 construed as a consent to sue the state or any department, agency, official or  
20 employee of the state or as a waiver of sovereign immunity.

21 **SECTION 5.** 165.25 (12) of the statutes is amended to read:

22 165.25 (12) REPRESENTATION ARISING FROM AGREEMENTS WITH MINNESOTA.  
23 Represent any employee of the state of Minnesota who is named as a defendant in  
24 any civil action brought under the laws of this state as a result of performing services  
25 for this state under a valid agreement between this state and the state of Minnesota

1 providing for interchange of employees or services and any employee of this state who  
2 is named as a defendant as a result of performing services for the state of Minnesota  
3 under such an agreement in any action brought under the laws of this state. Witness  
4 fees in any action specified in this subsection shall be paid in the same manner as  
5 provided in s. 885.07. The attorney general may compromise and settle any action  
6 specified in this subsection to the same extent as provided in s. 165.25 (6) (a) 2.

7 SECTION 6. 803.09 (2m) of the statutes is created to read:

8 803.09 (2m) When a party to an action challenges the constitutionality of a  
9 statute, <sup>facially, or as applied, as part of a claim or affirmative defense</sup> the assembly, the senate, and the state legislature may intervene in the  
10 action as a matter of right by serving a motion upon the parties as provided in s.  
11 801.14, within 45 days of receiving a copy of the proceedings under s. 893.825.

12 SECTION 7. 806.04 (11) of the statutes is amended to read:

13 806.04 (11) PARTIES. When declaratory relief is sought, all persons shall be  
14 made parties who have or claim any interest which would be affected by the  
15 declaration, and no declaration may prejudice the right of persons not parties to the  
16 proceeding. In any proceeding which involves the validity of a municipal ordinance  
17 or franchise, the municipality shall be made a party, and shall be entitled to be heard.  
18 If a statute, ordinance or franchise is alleged to be unconstitutional, the attorney  
19 general shall also be served with a copy of the proceeding and, except as provided  
20 under this subsection, be entitled to be heard. If a statute is alleged to be  
21 unconstitutional, the speaker of the assembly, the president of the senate, and the  
22 senate majority leader shall also be served with a copy of the proceeding and the  
23 assembly, the senate, and the state legislature are entitled to be heard in lieu of the  
24 attorney general. In any proceeding under this section in which the constitutionality,  
25 construction or application of any provision of ch. 227, or of any statute allowing a

INS  
6-11  
(SWB)

INS 6-24  
(SWB)

1 legislative committee to suspend, or to delay or prevent the adoption of, a rule as  
2 defined in s. 227.01 (13) is placed in issue by the parties, the joint committee for  
3 review of administrative rules shall be served with a copy of the petition and, with  
4 the approval of the joint committee on legislative organization, shall be made a party  
5 and be entitled to be heard. In any proceeding under this section in which the  
6 constitutionality, construction or application of any provision of ch. 13, 20, 111, 227  
7 or 230 or subch. I, III or IV of ch. 16 or s. 753.075, or of any statute allowing a  
8 legislative committee to suspend, or to delay or prevent the adoption of, a rule as  
9 defined in s. 227.01 (13) is placed in issue by the parties, the joint committee on  
10 legislative organization shall be served with a copy of the petition and the joint  
11 committee on legislative organization, the senate committee on organization or the  
12 assembly committee on organization may intervene as a party to the proceedings and  
13 be heard.

14 **SECTION 8.** Subchapter VIII (title) of chapter 893 [precedes 893.80] of the  
15 statutes is amended to read:

16 **CHAPTER 893**

17 **SUBCHAPTER VIII**

18 **CLAIMS AGAINST GOVERNMENTAL**

19 **BODIES, OFFICERS AND EMPLOYEES;**

20 **CONSTITUTIONAL CLAIMS**

21 **SECTION 9.** 893.825 of the statutes is created to read:

22 **893.825 Claim alleging a statute is unconstitutional.** (1) If a statute is  
23 alleged to be unconstitutional, the attorney general shall be served with a copy of the  
24 proceeding and, except as provided in sub. (2), is entitled to represent the state and  
25 be heard.

## SECTION 9

(2) If a statute is alleged to be unconstitutional, the speaker of the assembly, the president of the senate, and the senate majority leader shall also be served with a copy of the proceeding and the assembly, the senate, and the joint committee on legislative organization are entitled to be heard in lieu of the attorney general. The assembly shall represent the assembly, the senate shall represent the senate, and the joint committee on legislative organization shall represent the state.

-1WS  
8-4  
(548)

## SECTION 10. Fiscal changes.

(1) Notwithstanding s. 20.001 (3) (c), from the appropriation account under s. 20.455 (3) (g), on the effective date of this subsection, there is lapsed to the general fund the unencumbered balance of any settlement funds in that appropriation account, as determined by the attorney general.

(END)



**2019-2020 DRAFTING INSERT  
FROM THE  
LEGISLATIVE REFERENCE BUREAU**

LRB-6021/P4ins  
SWB/RAC/CMH:kf/an/cs

1           Insert A

SC ✓

Current law allows the attorney general to compromise or discontinue an action DOJ is prosecuting if the governor approves the compromise or discontinuance. This bill requires JCF to approve the compromise or discontinuance instead of the governor. Current law allows the attorney general to settle and compromise actions in which the attorney general is appearing for and defending the state as the attorney general determines to be in the best interest of the state. This bill requires that, if the action is for injunctive relief or there is a proposed consent decree, the attorney general must submit the settlement or compromise plan to JCF for passive review. If JCF does not schedule a meeting to review the plan within 14 days, the attorney general may proceed, but, if JCF does schedule a meeting, the attorney general may proceed only with the approval of JCF. ✓

2

3

4           ✓ Insert 3-14

5           ~~SECTION 1.~~ 165.08 of the statutes is renumbered 165.08 (1) and amended to  
6 read:

7           165.08 (1) Any civil action prosecuted by the department by direction of any  
8 officer, department, board, or commission, shall be compromised or discontinued  
9 when so directed by such officer, department, board, or commission.

10           (2) Any civil action prosecuted by the department on the initiative of the  
11 attorney general, or at the request of any individual may be compromised or  
12 discontinued with the approval of the governor by submitting a proposed plan to the  
13 joint committee on finance for the approval of the committee. The compromise or  
14 discontinuance may occur only if the joint committee on finance approves the  
15 proposed plan. No proposed plan may be submitted to the joint committee on finance  
16 if the plan concedes the unconstitutionality or other invalidity of a statute, facially  
17 or as applied, without the approval of the joint committee on legislative organization.

1           (3) In any criminal action prosecuted by the attorney general, the department  
2 shall have the same powers with reference to such action as are vested in district  
3 attorneys.

History: 2007 a. 20; 2015 a. 55.

4  
5           Insert 4-21<sup>✓</sup>

6           2. The attorney general may compromise and settle the action as the attorney  
7 general determines to be in the best interest of the state except that, if the action is  
8 for injunctive relief or there is a proposed consent decree, the attorney general may  
9 not compromise or settle the action without first submitting a proposed plan to the  
10 joint committee on finance. If, within 14 working days after the plan is submitted,  
11 the cochairpersons of the committee notify the attorney general that the committee  
12 has scheduled a meeting for the purpose of reviewing the proposed plan, the attorney  
13 general may compromise or settle the action only with the approval of the committee.  
14 The attorney general may not submit a proposed plan to the joint committee on  
15 finance under this subdivision in which the plan concedes the unconstitutionality or  
16 other invalidity of a statute, facially or as applied, without the approval of the joint  
17 committee on legislative organization.

18  
19           <sup>✓</sup>Insert 6-11 (SWB)

(stet) no underline

20           For purposes of this subsection, a motion to intervene shall be considered timely  
21 if it is filed within 45 days of receiving service under s. 806.04 (11) or 893.825 or if  
22 no service has been made under s. 806.04 (11) or 893.825.

23  
24           Insert 6-24 (SWB)

①

✓  
In an action involving the constitutionality of a statute, if the joint committee  
2 on legislative organization determines that the interests of the state will be best  
3 represented by special counsel appointed by the legislature, it shall appoint special  
4 counsel to represent state defendants and act instead of the attorney general.  
5 Special counsel appointed under this subsection shall have the powers of the  
6 attorney general with respect to the litigation to which special counsel has been  
7 appointed.

8  
9       Insert 8-4 (SWB)

10       In an action involving the constitutionality of a statute, if the joint committee  
11 on legislative organization determines that the interests of the state will be best  
12 represented by special counsel appointed by the legislature, it shall appoint special  
13 counsel to represent state defendants and act instead of the attorney general.  
14 Special counsel appointed under this subsection shall have the powers of the  
15 attorney general with respect to the litigation to which special counsel has been  
16 appointed.



State of Wisconsin  
2017 - 2018 LEGISLATURE

LRB-6021/P5  
SWB/RAC/CMH:kf/an/cs/ae

211

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

1P6

IN 11/27  
Requested  
today

INSERT  
D-Note

1 AN ACT *to renumber and amend* 165.08; *to amend* 165.10, 165.25 (6) (a),  
2 806.04 (11) and subchapter VIII (title) of chapter 893 [precedes 893.80]; and *to*  
3 *create* 13.365, 803.09 (2m) and 893.825 of the statutes; **relating to:** notice to  
4 the legislature of claims relating to constitutionality of statutes and right of the  
5 legislature to intervene and state settlement moneys and the settlement  
6 authority of the attorney general.

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***Analysis by the Legislative Reference Bureau***

***Notice to legislature of claims relating to constitutionality of statutes;  
legislative intervention***

This bill requires a party that alleges that a statute is unconstitutional to serve the speaker of the assembly, the president of the senate, and the senate majority leader with a copy of the proceeding. The bill also requires that, in such cases, the assembly, the senate, and the Joint Committee on Legislative Organization (JCLO) are entitled to be heard, representing the legislature and the state.

Under current law, if a statute, ordinance, or franchise is alleged to be unconstitutional, the attorney general must be served with a copy of the proceeding and be entitled to be heard. This requirement exists in the statutes for declaratory judgment acts under s. 806.04 (11). The Wisconsin Supreme Court has also extended the requirement to other types of actions involving claims that a statute is unconstitutional. See *Kurtz v. City of Waukesha*, 91 Wis. 2d 103, 280 N.W.2d 757

(1979). This bill incorporates the *Kurtz* rule into the statutes and extends both the current statutory and *Kurtz* requirements of service and an opportunity to be heard to the legislature when a statute is alleged to be unconstitutional.

The bill also provides that when a party challenges the constitutionality of a statute, facially or as applied, as part of a claim or affirmative defense, the assembly, the senate, and JCLO have the right to intervene and participate in the action and may also retain legal counsel other than the Department of Justice. Under the bill, the Committee on Assembly Organization may intervene in the action, as well as obtain legal counsel, on behalf of the assembly; the Committee on Senate Organization may intervene in the action, as well as obtain legal counsel, on behalf of the senate; and JCLO may intervene in the action, as well as obtain legal counsel, on behalf of the state.

INS  
Analysis

### ***State settlement moneys and settlement authority of attorney general***

Under current law, DOJ deposits settlement funds that are not committed under the terms of the settlement into a DOJ appropriation and may spend the funds only after submitting a plan for the expenditure to the Joint Committee on Finance for passive review. If JCF does not schedule a meeting to review the proposed plan within 14 days, DOJ may expend the funds as provided in the plan. This bill requires that DOJ must deposit all settlement funds into the general fund. This bill also lapses all unencumbered settlement funds that are currently in the DOJ appropriation into the general fund.

Current law allows the attorney general to compromise or discontinue an action DOJ is prosecuting if the governor approves the compromise or discontinuance. This bill requires JCF to approve the compromise or discontinuance instead of the governor. Current law allows the attorney general to settle and compromise actions in which the attorney general is appearing for and defending the state as the attorney general determines to be in the best interest of the state. This bill requires that, if the action is for injunctive relief or there is a proposed consent decree, the attorney general must submit the settlement or compromise plan to JCF for passive review. If JCF does not schedule a meeting to review the plan within 14 days, the attorney general may proceed, but, if JCF does schedule a meeting, the attorney general may proceed only with the approval of JCF.

The bill further provides that the attorney general may not submit a proposed settlement plan to JCF in which the plan concedes the unconstitutionality or other invalidity of a statute without the approval of JCLO.

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***The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:***

1       **13.365 Intervention.** Pursuant to s. 803.09 (2m), when a party to an action  
2 challenges the constitutionality of a statute, facially or as applied, as part of a claim  
3 or affirmative defense:

4       (1) The committee on assembly organization may intervene in the action on  
5 behalf of the assembly. The committee on assembly organization may obtain legal  
6 counsel other than from the department of justice, with the cost of representation  
7 paid from the appropriation under s. 20.765 (1) (a), to represent the assembly in any  
8 action in which the assembly intervenes.

9       (2) The committee on senate organization may intervene in the action on behalf  
10 of the senate. The committee on senate organization may obtain legal counsel other  
11 than from the department of justice, with the cost of representation paid from the  
12 appropriation under s. 20.765 (1) (b), to represent the senate in any action in which  
13 the senate intervenes.

14       (3) The joint committee on legislative organization may intervene in the action  
15 on behalf of the state. The joint committee on legislative organization may obtain  
16 legal counsel other than from the department of justice, with the cost of  
17 representation paid from the appropriation under s. 20.765 (1) (a) or (b), as  
18 determined by the cochairpersons, to represent the state in any action in which the  
19 joint committee on legislative organization intervenes.

20       **SECTION 2.** 165.08 of the statutes is renumbered 165.08 (1) and amended to  
21 read:

22       **165.08 (1)** Any civil action prosecuted by the department by direction of any  
23 officer, department, board, or commission, shall be compromised or discontinued  
24 when so directed by such officer, department, board, or commission.

1       **(2)** Any civil action prosecuted by the department on the initiative of the  
2 attorney general, or at the request of any individual may be compromised or  
3 discontinued ~~with the approval of the governor by submitting a proposed plan to the~~  
4 joint committee on finance for the approval of the committee. The compromise or  
5 discontinuance may occur only if the joint committee on finance approves the  
6 proposed plan. No proposed plan may be submitted to the joint committee on finance  
7 if the plan concedes the unconstitutionality or other invalidity of a statute, facially  
8 or as applied, without the approval of the joint committee on legislative organization.

9       **(3)** In any criminal action prosecuted by the attorney general, the department  
10 shall have the same powers with reference to such action as are vested in district  
11 attorneys.

12       **SECTION 3.** 165.10 of the statutes is amended to read:

13       **165.10 Limits on expenditure Deposit of discretionary settlement**  
14 **funds.** ~~Notwithstanding s. 20.455 (3), before the The attorney general may expend~~  
15 shall deposit all settlement funds under s. 20.455 (3) (g) ~~that are not committed~~  
16 ~~under the terms of the settlement, the attorney general shall submit to the joint~~  
17 ~~committee on finance a proposed plan for the expenditure of the funds. If the~~  
18 ~~cochairpersons of the committee do not notify the attorney general within 14 working~~  
19 ~~days after the submittal that the committee has scheduled a meeting for the purpose~~  
20 ~~of reviewing the proposed plan, the attorney general may expend the funds to~~  
21 ~~implement the proposed plan. If, within 14 working days after the submittal, the~~  
22 ~~cochairpersons of the committee notify the attorney general that the committee has~~  
23 ~~scheduled a meeting for the purpose of reviewing the proposed plan, the attorney~~  
24 ~~general may expend the funds only to implement the plan as approved by the~~  
25 committee into the general fund.

1           SECTION 4. 165.25 (6) (a) of the statutes is amended to read:

2           165.25 (6) (a) -At 1. Except as provided in s. 893.825 (2), at the request of the  
3           head of any department of state government, the attorney general may appear for  
4           and defend any state department, or any state officer, employee, or agent of the  
5           department in any civil action or other matter brought before a court or an  
6           administrative agency which is brought against the state department, or officer,  
7           employee, or agent for or on account of any act growing out of or committed in the  
8           lawful course of an officer's, employee's, or agent's duties. Witness fees or other  
9           expenses determined by the attorney general to be reasonable and necessary to the  
10          defense in the action or proceeding shall be paid as provided for in s. 885.07.

11          2. The attorney general may compromise and settle the action as the attorney  
12          general determines to be in the best interest of the state except that, if the action is  
13          for injunctive relief or there is a proposed consent decree, the attorney general may  
14          not compromise or settle the action without first submitting a proposed plan to the  
15          joint committee on finance. If, within 14 working days after the plan is submitted,  
16          the cochairpersons of the committee notify the attorney general that the committee  
17          has scheduled a meeting for the purpose of reviewing the proposed plan, the attorney  
18          general may compromise or settle the action only with the approval of the committee.  
19          The attorney general may not submit a proposed plan to the joint committee on  
20          finance under this subdivision in which the plan concedes the unconstitutionality or  
21          other invalidity of a statute, facially or as applied, without the approval of the joint  
22          committee on legislative organization.

23          3. Members, officers, and employees of the Wisconsin state agencies building  
24          corporation and the Wisconsin state public building corporation are covered by this  
25          section. Members of the board of governors created under s. 619.04 (3), members of



1 a committee or subcommittee of that board of governors, members of the injured  
2 patients and families compensation fund peer review council created under s.  
3 655.275 (2), and persons consulting with that council under s. 655.275 (5) (b) are  
4 covered by this section with respect to actions, claims, or other matters arising  
5 before, on, or after April 25, 1990. The attorney general may compromise and settle  
6 claims asserted before such actions or matters formally are brought or may delegate  
7 such authority to the department of administration. This paragraph may not be  
8 construed as a consent to sue the state or any department thereof or as a waiver of  
9 state sovereign immunity.

10 **SECTION 5.** 803.09 (2m) of the statutes is created to read:

11 **803.09 (2m)** When a party to an action challenges the constitutionality of a  
12 statute, facially or as applied, as part of a claim or affirmative defense, the assembly,  
13 the senate, and the state legislature may intervene in the action as a matter of right  
14 by serving a motion upon the parties as provided in s. 801.14. For purposes of this  
15 subsection, a motion to intervene shall be considered timely if it is filed within 45  
16 days of receiving service under s. 806.04 (11) or 893.825 or if no service has been made  
17 under s. 806.04 (11) or 893.825.

18 **SECTION 6.** 806.04 (11) of the statutes is amended to read:

19 **806.04 (11) PARTIES.** When declaratory relief is sought, all persons shall be  
20 made parties who have or claim any interest which would be affected by the  
21 declaration, and no declaration may prejudice the right of persons not parties to the  
22 proceeding. In any proceeding which involves the validity of a municipal ordinance  
23 or franchise, the municipality shall be made a party, and shall be entitled to be heard.  
24 If a statute, ordinance or franchise is alleged to be unconstitutional, the attorney  
25 general shall also be served with a copy of the proceeding and, except as provided

1 under this subsection, be entitled to be heard. If a statute is alleged to be  
2 unconstitutional, the speaker of the assembly, the president of the senate, and the  
3 senate majority leader shall also be served with a copy of the proceeding and the  
4 assembly, the senate, and the state legislature are entitled to be heard. In an action  
5 involving the constitutionality of a statute, if the joint committee on legislative  
6 organization determines that the interests of the state will be best represented by  
7 special counsel appointed by the legislature, it shall appoint special counsel to  
8 represent state defendants and act instead of the attorney general. Special counsel  
9 appointed under this subsection shall have the powers of the attorney general with  
10 respect to the litigation to which special counsel has been appointed. In any  
11 proceeding under this section in which the constitutionality, construction or  
12 application of any provision of ch. 227, or of any statute allowing a legislative  
13 committee to suspend, or to delay or prevent the adoption of, a rule as defined in s.  
14 227.01 (13) is placed in issue by the parties, the joint committee for review of  
15 administrative rules shall be served with a copy of the petition and, with the approval  
16 of the joint committee on legislative organization, shall be made a party and be  
17 entitled to be heard. In any proceeding under this section in which the  
18 constitutionality, construction or application of any provision of ch. 13, 20, 111, 227  
19 or 230 or subch. I, III or IV of ch. 16 or s. 753.075, or of any statute allowing a  
20 legislative committee to suspend, or to delay or prevent the adoption of, a rule as  
21 defined in s. 227.01 (13) is placed in issue by the parties, the joint committee on  
22 legislative organization shall be served with a copy of the petition and the joint  
23 committee on legislative organization, the senate committee on organization or the  
24 assembly committee on organization may intervene as a party to the proceedings and  
25 be heard.

The assembly shall represent the assembly, the senate  
shall represent the senate, and the joint committee  
on legislative organization shall represent the state.

1       **SECTION 7.** Subchapter VIII (title) of chapter 893 [precedes 893.80] of the  
2 statutes is amended to read:

3                               **CHAPTER 893**

4                               SUBCHAPTER VIII

5                               CLAIMS AGAINST GOVERNMENTAL

6                               BODIES, OFFICERS AND EMPLOYEES;

7                               CONSTITUTIONAL CLAIMS

8       **SECTION 8.** 893.825 of the statutes is created to read:

9       **893.825 Claim alleging a statute is unconstitutional.** (1) If a statute is  
10 alleged to be unconstitutional, the attorney general shall be served with a copy of the  
11 proceeding and, except as provided in sub. (2), is entitled to represent the state and  
12 be heard.

13       (2) If a statute is alleged to be unconstitutional, the speaker of the assembly,  
14 the president of the senate, and the senate majority leader shall also be served with  
15 a copy of the proceeding and the assembly, the senate, and the joint committee on  
16 legislative organization are entitled to be heard. In an action involving the  
17 constitutionality of a statute, if the joint committee on legislative organization  
18 determines that the interests of the state will be best represented by special counsel  
19 appointed by the legislature, it shall appoint special counsel to represent state  
20 defendants and act instead of the attorney general. Special counsel appointed under  
21 this subsection shall have the powers of the attorney general with respect to the  
22 litigation to which special counsel has been appointed. The assembly shall represent  
23 the assembly, the senate shall represent the senate, and the joint committee on  
24 legislative organization shall represent the state.

25       **SECTION 9. Fiscal changes.**

(1) Notwithstanding s. 20.001 (3) (c), from the appropriation account under s. 20.455 (3) (g), on the effective date of this subsection, there is lapsed to the general fund the unencumbered balance of any settlement funds in that appropriation account, as determined by the attorney general.

5 (END)

INS  
x  
DNOTE

2017  
**2019-2020 DRAFTING INSERT**  
FROM THE  
**LEGISLATIVE REFERENCE BUREAU**

LRB-6021/P5ins  
SWB/RAC/CMH:kf/an/cs/ae

**INSERT ANALYSIS**

167  
If JCLO determines that the interests of the state will be best represented by special counsel appointed by the legislature, JCLO must appoint special counsel to represent the state defendants and act instead of the attorney general. In these circumstances, special counsel has the powers of the attorney general with respect to the litigation to which special counsel has been appointed. ✓

**(END INSERT ANALYSIS)**

186ins

**DRAFTER'S NOTE**  
**FROM THE**  
**LEGISLATIVE REFERENCE BUREAU**

LRB-6021/P5dn  
SWB/RAC/CMH:rf/an/cs/ae all

November 27, 2018 ✓

✓  
1 I made a couple of technical changes in this version of the draft. I also, <sup>added</sup> two sentences  
2 to the analysis for clarity. With regard to the technical changes, I moved the sentence  
3 regarding representation of each entity in SECTION 8 (s. 893.825) for clarity. I then also  
4 added this language to SECTION 6 (s. 806.04 (11)) to ensure the language matches s.  
5 893.825. Please let me know if you have any questions or concerns. ✓

6 Sarah Walkenhorst Barber  
7 Legislative Attorney  
8 (608) 504-5826  
9 sarah.walkenhorstbarber@legis.wisconsin.gov

**DRAFTER'S NOTE  
FROM THE  
LEGISLATIVE REFERENCE BUREAU**

LRB-6021/P6dn  
SWB/RAC/CMH:all

November 27, 2018

I made a couple of technical changes in this version of the draft. I also added two sentences to the analysis for clarity. With regard to the technical changes, I moved the sentence regarding representation of each entity in SECTION 8 (s. 893.825) for clarity. I then also added this language to SECTION 6 (s. 806.04 (11)) to ensure the language matches s. 893.825. Please let me know if you have any questions or concerns.

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SWB - 1) making changes to ensure 893.825 and 806.04(11) provisions match

2) Rearranging text of 893.825 from previous version for clarity

3) Added sentence to analysis to reflect representation of state provisions in 806.04 and s. 893.825





-6021

11/27

(CMA)

- 1) Add phrasing to  
165.25 (1m) - if JCLO does not elect to intervene ✓

(CMA + SWB)?

- 2) Add stand alone provision in ch. 165 to clarify that if JCLO elects to intervene, AG must exit/not participate

(SWB)

- 3) Add to 806.04 + 893.825 - if <sup>Assembly/Senate/</sup>JCLO elects to intervene, the Assembly represents Assembly, Senate the Senate, and JCLO the State

(SWB)

- 4) Non stat to affirm JCLO can intervene in current cases and if decides to do so, AG must withdraw/exit

per Steve:

apply to state +  
federal court